Brian H. Gunn (SBN 192594)
bhgunn@wolfewyman.com
Meagan S. Tom (SBN 273489)
mstom@wolfewyman.com
WOLFE & WYMAN LLP
2175 N. California Blvd., Suite 645
Walnut Creek, California 94596-3502
Telephone: (925) 280-0004
Facsimile: (925) 280-0005

Attorneys for Defendant
PNC BANK, N.A. and HSBC BANK USA, NATIONAL ASSOCIATION as trustee for LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PERRY HOWE and KARINA LEE HOWE, Plaintiffs, v. PNC BANK, N.A. and HSBC BANK USA, NATIONAL ASSOCIATION as trustee for LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-2, Defendants.	Case No.: CV-13-5476-JSW Assigned to the Hon. Jeffrey S. White Courtroom 11 **DEFENDANTS PNC BANK, N.A.'S HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-2 NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT** Date: March 14, 2014 Time: 9:00 a.m. Courtroom: 11

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **March 14, 2014 at 9:00 a.m.** or as soon thereafter as the matter may be heard in Courtroom 11 of the above-entitled Court, located at , Defendants PNC BANK, N.A. and HSBC BANK USA, NATIONAL ASSOCIATION as trustee for LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-2

(collectively "Defendants") will move the Court pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), for an order dismissing Plaintiffs PERRY HOWE and KARINA LEE HOWE's (collectively "Plaintiffs") Complaint filed on November 26, 2013.

Defendants move to dismiss Plaintiffs' Complaint on the grounds that Plaintiffs fail to state a claim upon which relief may be granted as set forth in Federal Rules of Civil Procedure, Rule 12(b)(6).

The motion to dismiss is based on this notice of motion and motion, the supporting memorandum of points and authorities, all judicially noticed matters, all pleadings and papers on file in this action, on the reply (if any), and on any and such further oral and documentary evidence as may be presented at the hearing on this matter.

DATED: January 21, 2014

WOLFE & WYMAN LLP

By: ______________________________
BRIAN H. GUNN
MEAGAN S. TOM
Attorneys for Defendants
PNC BANK, N.A. and HSBC BANK USA, NATIONAL ASSOCIATION as trustee for LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES,SERIES 2007-2

TABLE OF CONTENTS

WOLFE & WYMAN LLP
ATTORNEYS & COUNSELORS AT LAW

Cases

Statutes

RULES

REGULATIONS

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On November 26, 2013, Plaintiffs PERRY HOWE and KARINA LEE HOWE (collectively "Plaintiffs") filed a Complaint against Defendants PNC BANK, N.A. ("PNC") and HSBC BANK USA, NATIONAL ASSOCIATION as trustee for LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-2 ("HSBC") (collectively "Defendants") asserting eight causes of action against Defendants for: (1) wrongful foreclosure, (2) quiet title, (3) slander of title, (4) fraud, (5) cancellation of instruments, (6) violation of California Civil Code § 2924.6(c) and (d), (7) violations of California Business and Professions Code § 17200, et seq., and (8) unjust enrichment. Defendants now move to dismiss Plaintiffs' Complaint because Plaintiffs fail to allege sufficient facts to support any claim against Defendants.

II. SUMMARY OF FACTUAL BACKGROUND

On or about February 20, 2007, Plaintiffs executed a Deed of Trust and Promissory Note ("Subject Loan") secured by real property located at 128 Pinheiro Circle, Novato, California 94945 ("Subject Property") with National City Bank. (Complaint ¶ 5, Exhibit A). Plaintiffs allege that the original loan servicer was National City Bank, and the current servicer is PNC. (Complaint ¶ 6).

Plaintiff alleges that the Subject Loan was sold to HSBC on or before May 1, 2007. (Complaint ¶ 7).

On July 19, 2010, LSI Title Company, as agent for Cal-Western Reconveyance Corporation ("Cal-Western"), recorded a Notice of Default with respect to the Subject Property. (Complaint ¶ 20, Exhibit C).

On September 14, 2010, Cal-Western recorded a Substitution of Trustee, substituting itself as trustee for National City Bank. (Complaint ¶ 23, Exhibit D). On June 27, 2011, Cal-Western recorded a Notice of Trustee's Sale. (Complaint ¶ 24, Exhibit E).

On May 31, 2012, PNC executed an Assignment of Deed of Trust, transferring all beneficial interest under the Deed of Trust to HSBC. (Complaint ¶ 25, Exhibit F).

On August 17, 2012, Cal-Western recorded a second Notice of Trustee's Sale. (Complaint ¶ 27, Exhibit G).

Plaintiff also alleges that on September 18, 2013, PNC wrote to Plaintiffs requesting additional information in order to complete the processing of their application for a loan modification. (Complaint ¶¶ 28-29, Exhibit H)

On September 24, 2013, Cal-Western recorded a third Notice of Trustee's Sale. (Complaint, ¶ 30, Exhibit I)

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) states that a party may assert a defense to a complaint based on the Plaintiff's failure to state a claim upon which relief can be granted. (F.R.C.P. 12(b)(6)) A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the claim or claims stated in the complaint. (Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) As such, the court must decide whether the facts alleged, if true, would entitle Plaintiff to some form of legal remedy. (Id.)

Therefore, a Rule 12(b)(6) motion is proper where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. (Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990); see also Robertson v. Dean Witter Reynolds, Co., 749 F.2d 530, 534 (9th Cir. 1984))

In ruling on a Rule 12(b)(6) motion, the court must construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded allegations as true, and determine whether those allegations, if proved, establish a valid claim for relief. (See Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998); see also Bell Atlantic Corp., supra, 550 U.S. 544 at 555). However, the plaintiff bears the burden of pleading facts sufficient to state a claim and the court will not supply a central element of a claim that a plaintiff did not plead. (Richards v. Harper, 864 F.2d 85, 88 (9th Cir. 1988))

A dismissal is also proper if a complaint is vague, conclusory, and fails to set forth material facts in support of its allegations. (Northstar International v. Arizona Corp. Commission, 720 F.2d 578, 583 (9th Cir. 1983).) This is so because it is "plaintiff's obligation to provide the grounds of her entitlement to relief which requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do." (Bell Atlantic Corp., *supra*, 550 U.S. 544 at 555.)

"Under notice pleading in federal court, the complaint must 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" (Id.) A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." (Id.)

IV. PLAINTIFFS' FIRST CLAIM FOR WRONGFUL FORECLOSURE FAILS

The crux of Plaintiffs' allegations rest upon the securitization of the Subject Loan and the subsequent assignments made regarding the Subject Loan from National City to PNC, then PNC to HSBC. Plaintiffs allege that as the Subject Loan's purported securitization was botched[1], the subsequent assignments to the Securitized Trust were belated and illegal, and as such that the Note was never properly assigned to the Trust, which rendered Defendants having no authority to allow PNC to collect mortgage payments from Plaintiffs or appoint Cal-Western to move forward with foreclosure proceedings. (Complaint ¶¶ 7-26) Plaintiffs further claim that HSBC have not recorded, or caused to be recorded, a Notice of Default. (Complaint ¶)

While Plaintiffs provide a multitude of legal and self-serving conclusions, Plaintiffs fail to provide facts sufficient to support their claims for wrongful foreclosure and as such, is subject to a motion to dismiss. (Bell Atlantic Corp., supra, 550 U.S. 544 at 555.) Nonetheless, Plaintiffs claims for wrongful foreclosure also fail for several reasons.

A. Plaintiffs' Lack Standing to Challenge the Securitization of the Subject Loan

At the core of Plaintiffs allegations, Plaintiffs allege that the loan is unenforceable because it was improperly securitized and, as a result, none of the Defendants were valid beneficiaries under the Deed of Trust, and could not appoint Cal-Western as Trustee, or appoint PNC as the servicer of the Subject Loan. (Complaint ¶¶ 7-26) However, Plaintiffs lack standing to challenge the purported securitization of the Subject Loan.

Only parties to a Pooling and Servicing Agreement ("PSA") or securitization agreement have

[1] Plaintiffs alternate between alleging that the Subject Loan was transferred into a Securitized Trust and thus, PNC and HSBC had no authority to commence foreclosure proceedings, or that due to the botched securitization of the Subject Loan, it was improperly transferred and thus no one had any beneficial interest.

standing to challenge the loan securitization process, and a debtor who is not a party to the PSA lacks standing to challenge the deed of trust's chain of ownership. This rule of law has been upheld throughout California. (Gantman v. United Pacific Ins. Co. 232 Cal.App.3d 1560, 1568 (App. Ct. 1991); Bascos v. Federal Home Loan Mortgage Corp. 2011 WL 3157063 *6 (C.D.Cal. Jul. 22, 2011) [Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust]; Logvinov v. Wells Fargo Bank 2011 WL 6140995 (N.D.Cal. Dec. 9, 2011) [securitization creates a separate contract distinct from plaintiffs' debt obligations and does not change relationship between plaintiff and lender on underlying loan]; Hague v. Wells Fargo Bank, N.A. 2011 WL 6055759 at *5 (N.D.Cal. Dec. 6, 2011) [REMIC securitization does not alter the Note]; Wadhwa v. Aurora Loan Services, LLC 2011 WL 2681483 *4 (E.D.Cal. July 8, 2011); In re Correia 452 B.R. 319, 324 (1st Cir.BAP June 30, 2011) [debtors who are not parties to a Pooling and Servicing Agreement lack standing to challenge their mortgage's chain of title].) However, Plaintiffs do not allege that any representations were or were not made by any party concerning the securitization of their loan.

Since Plaintiffs do not allege that they are a party to the PSA or a third-party beneficiary of the PSA or an investor, they have failed to establish that they have standing to maintain any claim relative to the securitization of the loan. (Blumhorst v. Jewish Family Services of Los Angeles 126 Cal.App.4th 993 (App. Ct. 2005), Powers v. Ashton 45 Cal.App.3d 783 (App. Ct. 1975)). As such, Plaintiffs' first claim for wrongful foreclosure, as well their entire complaint, fail on this basis alone.

B. Transfers of Plaintiffs' Loan Do Not Affect Plaintiffs' Obligation to Make Payments

Plaintiffs appear to be alleging that the loan is unenforceable because it was improperly securitized and as such, Defendants lacked any beneficial interest to assign via the Assignments. (Complaint ¶¶23-26). However, transfers of the loan have no effect on the validity or enforceability of the loan. In Jenkins v. JP Morgan Chase Bank, N.A. 216 Cal.App.4th 497, 514-515 (App. Ct. 2013), the plaintiff alleged that there were improper transfers of the note during the securitization process due to alleged non-compliance with the terms of the investment trust's pooling and servicing agreement. (Id.) In rejecting this contention, the Court observed that borrowers must anticipate that

their notes may be transferred, and that the transfers do not change the borrowers' obligations. The Court also noted that the borrowers lack standing to challenge the transfers since they are unrelated third parties unaffected by the substitution of one creditor for another. (Id. at pgs. 514-515; *see also*, Siliga v. Mortg. Elec. Registration Sys., Inc. 219 Cal.App.4th 75, 85 (App. Ct. 2013)). Consequently, Plaintiffs here lack standing to challenge the transfers because they were not parties to the transaction and were not affected by the transaction. The transfer of the loan simply substituted one creditor for another, without changing the Plaintiffs' obligations under the Note.

C. Assignments of Beneficial Interest Do Not Need to Be Recorded

As a result of the "botched" securitization, Plaintiffs allege that the foreclosure is wrongful, due to the "belated and illegal." Assignments, as they were executed and recorded after the date of the purported Securitized Trust's closing date, which results in a violation of the PSA. (Complaint ¶¶ 25-26; 39-40). However, there is no statutory requirement under California law which requires the recordation of an Assignment of Deed of Trust to complete a nonjudicial foreclosure. (Herrera v. Federal Nat. Mortg. Assn. 205 Cal.App.4th 1495 (App. Ct. 2012), Calvo v. HSBC Bank USA, N.A. 199 Cal.App.4th 118, 120 (App. Ct. 2011)). The rational for this holding is understood by the Court of Appeal's holding in Fontenot v. Wells Fargo Bank, N.A., 198 Cal.App.4th 256 (App. Ct. 2011). The Fontenot Court stated as follows:

> Plaintiff rests her argument on the documents in the public record, but **assignments of debt**, as opposed to assignments of the security interest incident to the debt, are commonly not recorded. The lender could readily have assigned the promissory note to HSBC in an unrecorded document that was not disclosed to plaintiff. To state a claim, plaintiff was required to allege not only that the purported MERS assignment was invalid, but also that HSBC did not receive an **assignment of the debt** in any other manner. There is no such allegation. Id. At p. 270 [Emphasis added.]

For essentially this reason, the actual transfer of a beneficial interest under a deed of trust could have occurred years before the assignment is actually recorded. (Wilson v. Pac. Coast Title Ins. Co 106 Cal.App.2d 599, 602 (App. Ct. 1951) (assignment of beneficial interest under the deed of trust three years prior to recording it "was a valid transfer of title.") As such, Plaintiffs' allegations regarding the purported belated transfer of the Subject Loan to the purported Securitized Trust must fail as well.

///

D. Plaintiffs' Wrongful Foreclosure Claim is Premature

Additionally, Plaintiffs' wrongful foreclosure claim is also premature because no foreclosure sale has taken place. (Complaint ¶ A). In Melendrez v. D & I Investment, Inc. 127 Cal.App.4th 1238, 1258, (App. Ct. 2005) the appellate court observed that "A nonjudicial foreclosure sale is accompanied by a common law presumption that it 'was conducted regularly and fairly.'" (Id., *quoting* Brown v. Busch 152 Cal.App.2d 200, 204 (App. Ct. 1957); Stevens v. Pulumas Eureka Annex Min. Co. 2 Cal.2d 493, 497 (App. Ct. 1935)). The court noted that "This presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity." (Id., *citing* 6 Angeles, Inc. v. Stuart-Wright Mortgage, Inc. 85 Cal.App.4th 1279, 1284 (App. Ct. 2001)). Further, the court ruled that "It is the burden of the party challenging the trustee's sale to prove such irregularity and thereby overcome the presumption of the sale's regularity." (Id.) Notably, "a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there *has been* an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust." (Munger v. Moore 11 Cal. App. 3d 1, 7 [emphasis added] (1970).) As no sale has taken place, Plaintiffs' claims are premature.

E. Plaintiffs' Fail to Provide Facts Showing a Prejudicial Procedural Irregularity

Finally, Plaintiffs have failed to provide any facts showing a prejudicial procedural irregularity. While Plaintiffs have alleged that the assignments were fraudulent, as they were belated and illegal, that Cal-Western could not have been appointed as the trustee, and that there was no notice of default filed by HSBC, Plaintiffs fail to allege any facts showing any prejudicial procedural irregularity. As such, Plaintiffs' claims for wrongful foreclosure also fail.

V. PLAINTIFFS' SECOND CLAIM FOR QUIET TITLE FAILS

Plaintiffs' second claim for quiet title is also based upon Plaintiffs' erroneous botched securitization theory and purported "illegal and belated" assignment theory. As such, these claims should fail solely based on the reasons stated above.

Furthermore, as Plaintiffs are also seeking to quiet title, Plaintiffs fail to allege that they tendered payment of the amount owed. Plaintiff cannot state a claim to quiet title without offering to pay the full amount of the debt for which the property was security. (Aguilar v. Bocci, 39

Cal.App.3d 475, 476 (App. Ct. 1974)) [holding Plaintiff could not quiet title without discharging his debt and a cloud upon his title would persist until the debt was paid]; *also see*, Mix v. Sodd, 126 Cal.App.3d 386, 390 (App. Ct. 1991) [noting that it is well established that no quiet title action can be stated without paying debt even where debt is otherwise unenforceable].). Here, Plaintiffs admit that they received proceeds from the Subject Loan in order to purchase the Subject Property. (Complaint ¶ 5). However, Plaintiffs fail to allege any facts that they have tendered or are able, willing, and able, to tender the full amount owed. As such, Plaintiffs' claim for quiet title should be dismissed.

VI. PLAINTIFFS' THIRD CLAIM FOR SLANDER OF TITLE FAILS

Plaintiffs' slander of title claims, like the rest of Plaintiffs' Complaint, rest upon their erroneous securitization theory, and "illegal and belated" assignment theory, and as such, fail to state a claim against Defendants for which relief can be granted.

Further, slander of title, is a false and unprivileged disparagement, oral or written, of the title to real or personal property, resulting in actual pecuniary damage. (Gudger v. Manton 21 Cal.2d 537, 541 (App. Ct. 1943), *disapproved on other grounds* in Albertson v. Raboff 46 Cal.2d 375, 381 (App. Ct. 1956).) Because the action for disparagement is based on pecuniary damage, it lies only where the damage has been suffered. (Appel v. Burman 159 Cal.App.3d 1209, 1214 (App. Ct. 1984).) In Burkett v. G. J. Griffith 90 App. Ct. 532, 537 (App. Ct. 1891), the California Supreme Court explained that a cause of action of action for slander of title must set out facts in the complaint showing how the publication was false and must set forth facts with particularity as to how Plaintiff has been damaged by the publication.

As discussed above, Plaintiffs' allegations that Defendants recorded fraudulent assignments based upon an improper securitization of the Subject Loan is unfounded. Further, while Plaintiffs provide many legal conclusions, Plaintiffs fail to plead any facts showing that said publications were done with malice, and how a third party relied upon the recordings. Finally, Plaintiffs fail to allege pecuniary loss, as Plaintiffs, while alleging that PNC had no authority to collect Plaintiffs' loan payments, fails to allege that they have been making payments to another entity for the Subject Loan, or that another entity has requested payments on the Subject Loan, or threatened Plaintiffs

with foreclosure proceedings. As such, Plaintiffs' claim for slander of title fails.

VII. PLAINTIFFS' FOURTH CLAIM FOR FRAUD FAILS

In addition to Plaintiffs' erroneous securitization and alleged subsequent fraudulent assignment theory, Plaintiffs' fraud claim fails for a multitude of reasons.

A. Plaintiffs Fail to Plead Sufficient Facts to Establish the Essential Elements of Fraud

The essential elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (Buckland v. Threshold Enterprises, Ltd., 155 Cal.App.4th 798, 807 (App. Ct. 2007).)

In this case, Plaintiffs alleges two specific, separate frauds: the alleged fraudulent assignments as well as fraudulent statements arising out of a PNC correspondence regarding Plaintiffs' loan modification. (Complaint ¶¶ 59-70). However, as noted above, Plaintiffs fail to allege facts demonstrating that there was any misrepresentation, knowledge of falsity, or intent to defraud. Furthermore, Plaintiffs fail to allege any facts supporting any resulting damages with respect to the alleged fraudulent assignments, as Plaintiffs lack standing to challenge the securitization of their loan, assignments do not need to be recorded at the time of transfer, as well as the transfer of the loan does not relieve Plaintiffs of their requirements to make payments under the terms of the Subject Loan.

Additionally, with respect to the allegations regarding PNC's correspondence regarding Plaintiffs' loan modification, Plaintiffs again fail to allege facts demonstrating justifiable reliance and resulting damages. Plaintiffs allege that PNC misrepresented to Plaintiffs that they were in loan modification negotiations, however foreclosure proceedings continued. Nowhere in Plaintiffs' Complaint do Plaintiffs allege facts that PNC represented that they were not going to proceed with foreclosure proceedings. Furthermore, Plaintiffs do not allege any resulting damage, as Plaintiffs admit no Trustee's Sale has gone forward. (Complaint ¶ A). As such, Plaintiffs fail to plead sufficient facts to support their claim for fraud.

VIII. PLAINTIFFS' FIFTH CLAIM FOR CANCELLATION OF INSTRUMENTS FAILS

Plaintiffs' Complaint seeks to cancel the Deed of Trust, Note, two Assignments, one Substitution, one Notice of Default, and one Notice of Trustee's Sale.

California Civil Code § 3412 provides:

> A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.

To state a cause of action for cancellation, a plaintiff must specifically allege facts demonstrating the invalidity of the written instrument. (Wolfe v. Lipsy, 163 Cal.App.3d 633, 638 (App. Ct. 1985).) An instrument which does not cause material injury is not subject to cancellation. (North Pac. S.S. Co. v. Terminal Inv. Co., 43 Cal.App. 182 (App. Ct. 1919).)

Further, California Civil Code § 3412 requires that the written instrument be against a person to whom it is void or voidable. "As a general rule a party to the contract or a privy thereto, and he alone, is entitled to maintain a suit to cancel or rescind it, and one who is a stranger to, or has no interest in, the subject matter of the suit is not ordinarily entitled to such relief." (Reina v. Erassarret, 90 Cal.App.2d 418, 423-424 (App. Ct. 1949).) Even the maker of a note has no right to contest the existence of consideration for the assignment of a note as between the original holder and its transferee. (Anderson v. Wickliffe, 178 Cal. 120, 121-122 (App. Ct. 1918).)

In this case, Plaintiffs' claims that the documents are purportedly defective because the neither PNC nor HSBC recorded documents showing any legally effective assignment of the Deed of Trust, based upon Plaintiffs' improper securitization theory. However, Plaintiffs are not alleged to be party to the Assignments, the Substitution, or the Trustee's Deed. As such, Plaintiff lacks standing to cancel the documents.

Furthermore, Plaintiffs' claims that the Deed of Trust and Note should be cancelled also fail, as Plaintiffs fail to allege facts demonstrating that said Deed of Trust and Note are void or voidable. As such, Plaintiffs' claims for cancellation of the Deed of Trust and Note also fails.

Additionally, as Plaintiffs' seek to basically rescind the Deed of Trust and Note, a plaintiff must generally restore to the defendant everything of value which the plaintiff has received from

defendant under the agreement. (Star Pac. Investments, Inc. v. Oro Hills Ranch, Inc. 121 Cal.App.3d 447, 457 (App. Ct. 1981)). Here, Plaintiffs has not offered to restore any entity; rather, Plaintiffs appear to seek to take title free and clear to the Subject Property without any repayment of the Subject Loan.

Finally, as the Deed of Trust and Promissory Note are written contracts, it is subject to the four-year statute of limitations of California Code of Civil Procedure § 337. Plaintiffs clearly state that they executed the Deed of Trust and Promissory Note on February 20, 2007 – over six years prior to the initiation of the instant lawsuit. (Complaint ¶ 5). As such, Plaintiffs' claim for cancellation of these instruments also is also significantly time-barred.

Based upon these foregoing reasons, the Court should grant the Motion to Dismiss the purported cancellation claim.

IX. PLAINTIFFS' SIXTH CLAIM FOR VIOLATION OF CALIFORNIA CIVIL CODE § 2923.6 FAILS[2]

Plaintiffs allege a violation of California Civil Code § 2923.6(c)(d), which are new provisions added by the California Homeowner's Bill of Rights ("HBOR"), based upon allegations of purported "dual-tracking" with respect to Plaintiffs' loan modification and the foreclosure sale. (Complaint ¶¶76-82).

California Civil Code 2923.6(c) provides in pertinent part as follows:

> (c) If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs:
>
> (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired.

---

[2] While Plaintiffs cite California Civil Code § 2924.6(c) and (d), Plaintiffs appear to be quoting from California Civil Code § 2923.6(c) and (d). As such, this Motion presumes that Plaintiffs are complaining of a violation of California Civil Code § 2923.6.

(2) The borrower does not accept an offered first lien loan modification within 14 days of the offer.

(3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification.

However, pursuant to California Civil Code § 2924.15(a):

(a) Unless otherwise provided, paragraph (5) of subdivision (a) of Section 2924, and Sections 2923.5, 2923.55, **2923.6**, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.18 shall apply only to first lien mortgages or deeds of trust that are secured by owner-occupied residential real property containing no more than four dwelling units. For these purposes, "owner-occupied" means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes. (emphasis added).

In this matter, Plaintiffs fail to allege that the Subject Property was owner occupied. As such, Plaintiffs fail to allege facts to support their claim that PNC violated California Civil Code § 2923.6(c). Thus, Plaintiffs' sixth claim also fails.

X. PLAINTIFFS' SEVENTH CLAIM FOR VIOLATION OF BUS. & PROFS. CODE §17200 FAILS

Plaintiffs' Seventh Claim alleges a violation of the Business and Professions Code §17200 ("UCL") under the unfair, unlawful, and fraudulent prongs. The UCL is written in the disjunctive, as it establishes three varieties of unfair competition—unlawful, unfair, or fraudulent business practices. (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. 20 Cal.4th 163, 181 (App. Ct. 1999).)

A. Plaintiffs Fail to Allege a Claim Under the Unlawful Prong

To allege a business practice is unlawful, Plaintiffs must allege a predicate statute. In support of their claim under the unlawful prong of section 17200, Plaintiffs appear to be alleging that several statutes were breached, although they fail to allege facts supporting each breach. For instance, Plaintiffs conclusorily allege Defendants failed to comply with: California Civil Code §§ 1572, 1708, 1709, 2924(a)(1), 2924(a)(1)(C), 2924(b)(c) (d), 2934(a)(1)(A), and California Penal Code § 115. (Complaint ¶85(a)-(g).) However, in addition to the arguments discussed above, there are no facts to support that there was any such violation. Thus, Plaintiffs' allegations do not support any violation of the unlawful prong of Business and Professions Code § 17200.

B. Plaintiffs Fail to Allege a Claim Under the Unfair Prong

To allege a business practice is unfair, plaintiff must allege the "conduct threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" (Byars v. SCME Mortgage Bankers 109 Cal.App.4th 1134, 1147 (App. Ct. 2003).) In the alternative, a practice is unfair if it violates public policy that is "tethered" to specific constitutional, statutory or regulatory provisions. (Scripps Clinic v. Superior Court 108 Cal.App.4th 917 (App. Ct. 2003)).

Here, Plaintiffs appear to rest their unfair claim on their botched securitization theory, and "illegal and belated" assignments. These allegations do not relate to a specific constitutional, statutory or regulatory provision, nor do the allegations support any conduct that violates antitrust law. As discussed above, the statutes which are cited (with no supporting facts alleging how they were breached) are not sufficient to maintain any claim against these Defendants. Accordingly, Plaintiffs' allegations do not support any violation of the unfair prong of Business and Professions Code §17200.

C. Plaintiff Fails to Allege a Claim Under the Fraudulent Prong

The general test for whether an act is considered "fraudulent" under section 17200 is whether members of the general public are likely to be deceived. (Committee on Children's TV v. General Foods Corp. 35 Cal. 3d 197, 211 (App. Ct. 1983)). As a derivative cause of action, a claim for unfair business practices under § 17200 is only as valid as the underlying allegations relating to the "borrowed" causes of action. (DiPirro v. American Isuzu Motors, Inc. 119 Cal.App.4th 966 (App. Ct. 2004).) A "defendant cannot be liable under section 17200 for committing 'unlawful business practices' without having violated another law." (Ingles v. Westwood One Broadcasting Services, Inc. 129 Cal.App.4th 1050, 1060 (App. Ct. 2005)) "Where a[n unfair competition law] claim is derivative of another claim that fails as a matter of law, the UCL claim must similarly fail." (Nein v. HostPro, Inc. 174 Cal.App.4th 833, 841 (App. Ct. 2009).)

As discussed above, Plaintiffs have failed to state any cause of action against these Defendants. Dismissal of the section 17200 claim is thus proper. Furthermore, Plaintiffs'

allegations that the general public was harmed is a conclusory allegation without any supporting facts alleged.

For these reasons, the Complaint is devoid of any factual allegations to support the fraudulent prong of the unfair business practices prong of an unfair business practices claim.

XI. PLAINTIFFS' EIGHTH CLAIM FOR UNJUST ENRICHMENT FAILS

Plaintiffs cannot state a claim for unjust enrichment because unjust enrichment is not a cause of action, but rather a general principal underlying various legal doctrines and remedies. (McBride v. Boughton 123 Cal. App. 4th 379, 387 (App. Ct. 2004); Melchior v. New Line Prods., Inc. 106 Cal.App.4th 779-793 (App. Ct. 2003).) As such, Plaintiffs' claim should fail on this basis alone.

Further, to allege on a cause of action for restitution, Plaintiff must show: "'[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another.'" (McBride v. Boughton 123 Cal.App.4th 379, 389 (App. Ct. 2004)). However, the fact that a person receives benefits from another "is not, by itself, sufficient to require restitution." (Id.). A defendant is only required to make restitution if the enrichment is unjust. (Id.; Enterprise Leasing Corp. v. Shugart Corp. 231 Cal.App.3d 737, 748 (App. Ct. 1991)).

Here, Plaintiff's Complaint does not contain any specific facts that PNC was unjustly enriched. As discussed above, Plaintiffs' allegations that PNC had no right to collect mortgage payments on the Subject Loan based upon Plaintiffs' erroneous theories are incorrect. Plaintiffs also do not plead any facts suggesting PNC was being unjustly enriched at the expense of Plaintiffs: Plaintiffs do not allege any facts that they were making payments to another entity as well for the Subject Loan, or that PNC was not crediting the mortgage payments to the Subject Loan. Thus, Plaintiffs' unjust enrichment claim also must fail as they have not plead sufficient facts to support such a claim.

Finally, a claim for unjust enrichment is generally precluded "when an enforceable, binding agreement exists defining the rights of the parties." (Paracor Fin. v. Gen. Elec. Capital Corp. 96 F.3d 1151, 1167 (9th Cir. 1996).) As discussed above, Plaintiffs' knowledge or consent to the transfer of the loan does not change their obligations under the Subject Loan. As such, in light of the written, binding and enforceable Subject Loan documents executed by Plaintiffs and attached and

WOLFE & WYMAN LLP
ATTORNEYS & COUNSELORS AT LAW

incorporated into the Complaint as Exhibit A, Defendants' motion should be sustained.

XII. CONCLUSION

Based on all of the foregoing reasons, those to be set forth in the reply (if any), and at oral argument on this matter, Defendants respectfully requests that the Court grant its Motion to Dismiss Plaintiffs' Complaint in its entirety.

DATED: January 21, 2014

WOLFE & WYMAN LLP

By: [signature]
BRIAN H. GUNN
MEAGAN S. TOM
Attorneys for Defendants
PNC BANK, N.A. and HSBC BANK USA, NATIONAL ASSOCIATION as trustee for LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES,SERIES 2007-2

WOLFE & WYMAN LLP
ATTORNEYS & COUNSELORS AT LAW
W&W

PROOF OF SERVICE

STATE OF CALIFORNIA)
) **ss.**
COUNTY OF CONTRA COSTA)

I, Joni M. Wilson, declare: I am employed in the County of Contra Costa, State of California. I am over the age of 18 and not a party to the within action. My business address is 2175 North California Blvd., Suite 645, Walnut Creek, California 94596-3502.

On the date shown below, I served the document(s) described as **DEFENDANTS PNC BANK, N.A.'S HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR LUMINENT MORTGAGE TRUST 2007-2, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-2 NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT** on all interested parties in said action by placing a true copy thereof in a sealed envelope addressed as stated on the ATTACHED SERVICE LIST.

☐ **BY MAIL**: as follows:

☐ **FEDERAL** – I deposited such envelope in the U.S. Mail at Irvine, California, with postage thereon fully prepaid.

☒ **BY ELECTRONIC MAIL** as follows: I hereby certify that I electronically transmitted the attached document(s) to the U.S. District Court using the CM/ECF System for filing, service and transmittal of Notice of Electronic Filing to the CM/ECF registrants for this case. Upon completion of the electronic transmission of said document(s), a receipt is issued to the serving party acknowledging receipt by ECF's system, which will be maintained with the original document(s) in our office.

☐ **BY PERSONAL SERVICE** as follows: I caused a copy of such document(s) to be delivered by hand to the offices of the addressee between the hours of 9:00 A.M. and 5:00 P.M.

☐ **BY OVERNIGHT COURIER SERVICE** as follows: I caused such envelope to be delivered by overnight courier service to the offices of the addressee. The envelope was deposited in or with a facility regularly maintained by the overnight courier service with delivery fees paid or provided for.

☐ **BY FACSIMILE** as follows: I caused such documents to be transmitted to the telephone number of the addressee listed on the attached service list, by use of facsimile machine telephone number. The facsimile machine used complied with California Rules of Court, Rule 2004 and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), a transmission record of the transmission was printed.

☒ **FEDERAL** I declare that I am employed in the offices of a member of the State Bar of this Court at whose direction the service was made.

Executed on January 24, 2014, at Walnut Creek, California.

Joni M. Wilson

Joni M. Wilson

SERVICE LIST
Northern District Court, Case No.: 3:13-cv-05476-JSW
HOWE v. PNC BANK, N.A., ET AL.
W&W File No. 1264-551
[Revised: 12/12/2013]

Charles Thomas Marshall LAW OFFICES OF CHARLES T. MARSHALL 415 Laurel Street, #405 San Diego, CA 92101	**Attorney for Plaintiffs** **PERRY HOWE and KARINA HOWE** Tel: (619) 807-2628 Fax: (866) 575-7413 Email: cmarshall@marshallestatelaw.com